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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LARKLAND GASSOWAY,

Defendant and Appellant.

C048317

(Super. Ct. Nos.  
SF086978A & SF091924A)

Defendant violated probation from a previous drug conviction and committed new drug crimes. Found in violation of probation and convicted of the new charges, defendant appeals. He asserts the trial court erred by (1) granting his motion to represent himself and (2) denying his motion to wear civilian clothes at trial. We affirm.

#### BACKGROUND

While on probation for possession of a controlled substance, defendant failed to report to his probation officer and was later found in possession of cocaine and related

paraphernalia. Stockton police officers spotted defendant standing up from behind a garbage can. At his feet was a homemade pipe. About 12 inches from the pipe, the officers found cocaine base.

After a hearing in which he represented himself, defendant was found to have violated probation. Thereafter, the district attorney filed an information charging defendant with felony possession of a controlled substance and misdemeanor possession of paraphernalia, along with prior strike and prison term allegations. After a jury trial in which defendant represented himself, he was convicted of the crimes as charged. The trial court found true the prior strike and prison term allegations. The court sentenced defendant to a total term of six years on the new charges with a consecutive eight months for the case in which defendant violated probation.

## DISCUSSION

### I

#### *Self-Representation*

Defendant asserts the trial court erred in allowing him to represent himself because "he was substantially disabled and therefore he could not genuinely realize the risk of self-representation or the complexities of the case." He contends the sentencing consequences and procedural elements of the case were beyond his power to comprehend. We conclude the trial court did not err in granting defendant's motion to represent himself.

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Faretta v. California* (1975) 422 U.S. 806, 835 [45 L.Ed.2d 562, 581-582] (*Faretta*).) "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.)

On April 19, 2004, defendant represented himself at a hearing to determine whether he had violated probation by failing to report to his probation officer. The court determined he violated probation.

On May 18, 2004, Judge James Hammerstone arraigned defendant on the current charges. Defendant stated that he wanted to represent himself, and the court responded: "In your situation, someone who represents himself has an idiot for a lawyer, or fool for a client." Defendant acknowledged he had heard that before from Judge Hammerstone. The court concluded: "You were in pro per on other matters. I'll allow you to be pro per." When the court asked what defendant intended to do about the charges, defendant said: "Can I actually get a lawyer?"

The court responded: "Deny." After asking for transcripts, defendant reiterated his intention, saying: "I'd like to represent myself." He added that he wanted a "fast and speedy trial." The court asked: "Well, how do you get to trial?" To this rather general question, defendant did not have a specific answer, other than to say that he was ready to proceed.

This was not defendant's first foray into self-representation. Several years ago, Judge Hammerstone heard and denied defendant's request to represent himself in a felony proceeding. We reversed the conviction on appeal, finding the trial court violated defendant's right to represent himself even though defendant lacked legal qualifications and did not appear to be able to represent himself competently. (*People v. Gassoway* (Nov. 15, 2001, C036224) [nonpub. opn.].)

On July 6, 2004, defendant appeared before Judge Thomas Harrington for a pretrial conference. During the conference, defendant told the court he needed an interpreter to explain the legal proceedings. The court attempted to correct defendant by telling him that interpreters were for language translations, not to function as lawyers. Although defendant continued to ask for someone to explain the legal proceedings, he made it clear he did not want an attorney. Later in the hearing, the court asked defendant if he wished to have an attorney. Defendant said he did not. The court asked: "Do you read the English language?" Defendant replied: "Somewhat, yes." At this point, the court had defendant fill out a *Faretta* waiver form and then went over the form, point by point, with defendant, including

discussions concerning defendant's trial rights. Defendant told the court he attended high school to 11th grade and had some further education while incarcerated and that he had represented himself in earlier proceedings. The court advised defendant that he could be represented by the public defender's office and that he should consult with counsel before making the decision to represent himself. The court also told defendant he would be required to follow all rules of criminal procedure and evidence, would be opposed by an experienced deputy district attorney, and would be responsible for his own defense to the specific crimes charged. Concerning the risk of representing himself, the court informed defendant he could be sentenced to a maximum of 11 years, with another five years for prior prison terms.

After this extensive and exhaustive colloquy, the trial court denied defendant's request to represent himself. It concluded defendant did not understand or did not wish to acknowledge his understanding of "his right to have the recommendation of counsel on whether or not he should proceed" and of the sentencing risk.

Two days later, on July 8, 2004, the case returned to Judge Hammerstone's courtroom. The court stated: "I have read a copy of the proceedings had before Judge Harrington July 6th whereby he indicated that [defendant] should not proceed in pro per.

[¶] However, one of the rulings -- the grounds for that is that [defendant] told him -- him being Judge Harrington -- that he did not understand that he would have the right to talk to a lawyer in regards to his waiver of counsel and his desire to

proceed in pro per. [¶] I don't think that is a component of a competent waiver." Reminding defendant of the warnings Judge Harrington gave, Judge Hammerstone asked defendant if he wished to waive his right to counsel. Defendant responded affirmatively, and the court allowed defendant to represent himself.

During trial, defendant made a few statements that he now cites as evidence that he was "substantially disabled" and incapable of conducting his own defense. For example, he misunderstood the effect of filing a writ petition, claiming "everything is supposed to stop because I say so." He attempted to introduce evidence that, on the day of his arrest, he had already used cocaine, ostensibly to show that the cocaine found near him was not his (because he had already used his own). Defendant explained to the court that he intended to defend against the charges by showing that he could not have planned to possess drugs because he was addicted. He described this defense as "the abhorrent behavior downward." During the trial on the prior convictions, he stated a belief that he was being tried for those crimes a second time or that he was being tried for a crime of which he had been acquitted.

Defendant asserts the record establishes he was not fully made aware of the risks of self-representation. To the contrary, the trial court reviewed with defendant a form listing his rights and the risks of self-representation and informed him of the sentencing risk. This is not a case in which the court failed to give proper admonitions. Defendant instead contends

he was not capable of understanding the court's admonitions and making an informed decision to represent himself. Although defendant is admittedly a homeless drug addict, he was able to communicate in court and had, at least, the minimal ability to conduct a defense. That his defense was not effective does not establish the trial court erred in granting the *Faretta* motion. "[A] proclivity to boast or exaggerate, a tendency to digress in argument, a shaky grasp of the legal concept of relevancy, even a certain tangentiality in speech patterns does not necessarily mean that a defendant lacks a rational and factual understanding of the proceedings, the basic criterion for competency. [Citation.]" (*People v. Koontz, supra*, 27 Cal.4th at p. 1073.)

Defendant asserts that, because he asked for a lawyer during his arraignment and the court denied the request, we must reverse. In context, however, the request for a lawyer was not a request to be represented by a lawyer. Just before the request, defendant stated his desire to represent himself. Soon after the request, defendant reiterated his desire to represent himself. Therefore, the request for a lawyer can best be interpreted as a request for advisory counsel. Defendant makes no contention that the trial court should have appointed advisory counsel.

"With [defendant] representing himself," complains defendant, "his case was reduced to a farce. Allowing [defendant] to waive counsel was demeaning and constituted a mockery of justice." Defendant provides no authority for this proposition. The trial court was bound by *Faretta* to permit

defendant to represent himself, even if he damaged his chances for acquittal. "It is well established that '[t]he only [competency] determination a trial court must make when presented with a timely *Faretta* motion is "'whether the defendant has the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and consequences of his action.'" [Citations.] It is not, however, essential that defendant be competent to serve as counsel in a criminal proceeding . . . ." [Citation.]" (*People v. Poplawski* (1994) 25 Cal.App.4th 881, 888.)

Defendant cites several cases in which the denial of a *Faretta* motion was upheld on appeal because the defendant was incapable of conducting his own defense. (See *People v. Manago* (1990) 220 Cal.App.3d 982; *People v. Watkins* (1992) 6 Cal.App.4th 595; *In re Shawnn F.* (1995) 34 Cal.App.4th 184.) These cases, however, are fundamentally different. There, the trial courts were able to observe the defendants, personally, and determine they were incompetent to make the decision to represent themselves. Here, we have only the cold record. While it is true that Judge Harrington denied the *Faretta* motion, he did so on the narrow ground that defendant did not understand or, importantly, did not wish to acknowledge his understanding of the right to confer with an attorney about his choice and the sentencing risk involved in the case. Judge Hammerstone, who had more experience with defendant, disagreed, and the record supports that position because it shows defendant was apprised of those rights and risks. Reviewing Judge



Hammerstone's determination, we cannot say that the record, with its inability to convey fully defendant's demeanor and comportment, is sufficient to reverse the granting of defendant's motion, consistent with his constitutional right to waive counsel and represent himself.

## II

### *Trial Clothing*

On the first day of trial, the trial court, Judge William Murray, Jr., presiding, asked defendant if he "ha[d] some clothes" and whether he intended to go to trial in jail clothing. Defendant replied that it did not matter because the truth would come out. The court told defendant it was up to him but that he was entitled to wear street clothes. Defendant stated: "Let me have some street clothes." He admitted to the court he had made no arrangements for street clothes, and the court informed defendant it was his responsibility.

After jury selection, defendant complained about "the orange outfit." The trial court reminded defendant of the earlier conversation and defendant's responsibility to obtain street clothes. Defendant agreed. The court then offered to facilitate the exchange if defendant, or someone acting on his behalf, found some clothing, but defendant eventually stated: "Never mind. Never mind. It ain't even no problem no more. It was just brought it up and I wanted to squeal about it, that's all." (Sic.)

On appeal, defendant characterizes these exchanges as a denial of his motion to wear civilian clothing during the trial.

No such motion, however, was ever made. The trial court inquired into the matter, told defendant he had a right to wear civilian clothing, and offered to facilitate an exchange. Defendant elected not to obtain clothing.

Defendant also contends the trial court should have obtained the clothing for defendant. For this proposition, he offers no authority. We know of none. Acting as his own attorney, defendant, as he admitted at trial, had the responsibility to locate clothing to wear. Instead of obtaining clothing, defendant said it did not matter. In other words, he expressly waived the right to appear at trial in civilian clothing. (See *People v. Taylor* (1982) 31 Cal.3d 488, 501 [allowing express waiver of right to wear civilian clothing at trial].)

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, NICHOLSON, Acting P.J.

We concur:

\_\_\_\_\_, ROBIE, J.

\_\_\_\_\_, BUTZ, J.